



# Corporate war crimes and other liabilities

**An introduction to the ways corporations may be  
liable for war crimes in Australia.**

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### **Australian Red Cross International Humanitarian Law Program**

With a mandate under international legal frameworks to promote international humanitarian law (IHL) and assist Government in ensuring respect for IHL, the Australian Red Cross IHL Department works with a wide range of stakeholders (including the broader network of the International Red Cross and Red Crescent Movement) to promote the laws of war in Australia. The Australian Red Cross IHL Department supports Australian organisations with operations in conflict zones to embed IHL into their organisational policies and capabilities to improve humanitarian outcomes for people impacted by conflict.

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## Introduction

International humanitarian law (**IHL**), also known as the laws of war or the law of armed conflict, is a set of universally-accepted rules that seek to limit the effects of war. The purpose of IHL is to maintain some humanity in armed conflicts – saving lives, reducing suffering, and respecting basic human dignity.

To do this, IHL protects people who are not or are no longer participating in hostilities, including wounded and sick soldiers and sailors, prisoners of war, military medical and religious personnel and all civilians. It also restricts the means and methods of warfare by placing limits on the types of weapons and military tactics used in armed conflict to limit unnecessary suffering.

IHL is binding on anyone or any entity with activities closely linked to an armed conflict, including States, military forces, organised armed groups, and individual soldiers. In certain circumstances, companies operating in armed conflict zones, and its personnel, will be bound by these laws.

At the International Criminal Court (**ICC**) only individuals can be prosecuted for breaches of these laws. However, in Australia, a company can be liable for war crimes under its domestic law. This briefing paper summarises the ways corporations may be liable for war crimes in Australia.



*Humanitarian needs assessment, Ukraine – ICRC/Alyona Synenko*

# What are war crimes and how are they regulated?

## War crimes under international humanitarian law

War crimes are serious violations of IHL. They are a mechanism by which people and entities that seriously violate these laws can be held criminally accountable.

War crimes can only occur in the context of an armed conflict. An armed conflict exists where one or more States have recourse to armed force against another State or where, within a State, there exists protracted armed violence between government forces and organised armed groups, or between such groups. The first situation is known as international armed conflict (**IAC**), and the second is known as non-international armed conflict (**NIAC**).

War crimes are codified in multiple treaties, most recently under the Rome Statute of the International Criminal Court (2002) (**Rome Statute**).<sup>1</sup> The ICC has jurisdiction to prosecute serious international crimes, including war crimes. The ICC can only prosecute crimes against individuals of States that are party to the Rome Statute or where crimes occur the territory of a State party - it cannot prosecute companies.

States also have the authority to prosecute war crimes under the principle of universal jurisdiction, as these crimes are considered so grave that they affect the international community as a whole. Universal jurisdiction enables States to punish offenders that commit war crimes, even if there is no link between the crime and the prosecuting State. To carry out such prosecutions, States must enact universal jurisdiction for war crimes in their national legislation.

## War crimes under Australian law

Australia is party to the four Geneva Conventions of 1949,<sup>2</sup> their two Additional Protocols of 1977,<sup>3</sup> and the Rome Statute. Australia incorporated these treaties into its domestic law, criminalising conduct that constitutes war crimes. The Australian *Criminal Code Act 1995* (Cth) (**Criminal Code**) contains 78 different war crime offences including:<sup>4</sup>

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<sup>1</sup> Art 8 of the *Rome Statute of the International Criminal Court, (last amended 2010), 17 July 1998* ('Rome Statute').

<sup>2</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (entered into force 21 October 1950) ('GC I'); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (entered into force 21 October 1950) ('GC II'); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949 (entered into force 21 October 1950) ('GC III'); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (entered into force 21 October 1950) ('GC IV').

<sup>3</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (entered into force 7 December 1978) ('API'); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (entered into force 7 December 1978) ('APII').

<sup>4</sup> Division 268 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') are divided into the following subdivisions of war crimes:

- wilful killing, torture, mutilation or inhumane treatment
- attacking civilians or civilian objects or other protected persons or objects
- destruction and appropriation of property
- compelling service in hostile forces
- unlawful deportation, transfer or confinement
- employing prohibited weapons, poison, prohibited gases, liquids, materials or devices
- rape, sexual slavery or enforced prostitution
- the use of child soldiers

To commence a war crimes prosecution under the Criminal Code, the Attorney-General must first provide their written consent.<sup>5</sup>



*Bombed hospital, Ukraine – ICRC/Alyona Synenko*

- Subdivision D: War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions (Sections 268.24–268.34);
- Subdivision E: Other serious war crimes that are committed in the course of an international armed conflict” (Sections 268.35–268.68)
- Subdivision F: War crimes that are serious violations of article 3 common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict (Sections 268.69–268.76)
- Subdivision G: War crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict (Sections 268.77–268.94) and
- Subdivision H: War crimes that are grave breaches of Protocol I to the Geneva Conventions (Sections 268.95–268.101)

<sup>5</sup> Section 268.121 of the *Criminal Code*.

# How can companies be held liable for war crimes in Australia?

## Criminal responsibility for corporations

A corporation can be responsible for war crimes under the Criminal Code.<sup>6</sup> There are different types of conduct that can lead to the conviction of a corporation for any offence. The most relevant four are:

- *Committing*: Where a member of the corporation physically commits the war crime. In this instance, the act is carried by an ‘employee, agent or officer’ of the corporation acting within the scope of their employment, and with the express, tacit or implied authority or permission of the corporation.<sup>7</sup> This does not necessarily mean that a director approved the action – it can be enough that the corporate culture encouraged or tolerated it.<sup>8</sup> Alternatively, it may be sufficient that corporate management inadequately controlled or supervised the conduct of the employee or failed to provide adequate systems for conveying relevant information.<sup>9</sup>
- *Joint Commission*: Where a corporation enters into an agreement with another corporation or person, and either an offence is committed in accordance with, or in the course of carrying out, the agreement. This means the corporation may be liable in instances where it did not intend or plan for the crime to occur.<sup>10</sup>
- *Conspiracy*: Where the corporation plans or agrees to commit an offence together with another corporation or person. Only one party must act in furtherance of the plan for all parties to be criminally responsible. The plan does not have to be successful, or even attempted for the corporation to be liable for the offence.<sup>11</sup>
- *Complicity*: Where an unconnected person or entity commits the offence but the corporation is complicit – meaning that the corporation provides support or encouragement to the person or entity carrying out the physical act. Aiding, abetting, counselling or procuring are common types of complicity.<sup>12</sup>

Joint commission, conspiracy and complicity are not less serious forms of accountability, they are simply different mechanisms by which an entity can be found guilty of an offence.

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<sup>6</sup> Section 12 of the *Criminal Code*.

<sup>7</sup> Section 12.2, 12.3(1) of the *Criminal Code*.

<sup>8</sup> Section 12.3(2)(d) of the *Criminal Code*.

<sup>9</sup> Section 12.4(3) of the *Criminal Code*.

<sup>10</sup> Section 11.2A of the *Criminal Code*.

<sup>11</sup> Section 11.5 of the *Criminal Code*.

<sup>12</sup> Section 11.2 of the *Criminal Code*.

All four types of conduct may result in the conviction of the corporation for a war crime and carry identical penalties. To date, there has never been a criminal prosecution of a company for war crimes in Australia.

## Corporate penalties

Individuals, such as directors, board members, employees or agents of the corporation, found guilty of war crimes can face maximum imprisonment terms, ranging from ten years to life. The corporation itself, a legal person, can also be found guilty. While a corporation cannot incur prison sentences, it can be fined. The maximum penalties that can be imposed on a corporation is five times the penalty imposed on an individual.<sup>13</sup> Companies face maximum fines between 3,000 and 10,000 penalty units (AUD 666,000 – AUD 2,220,000)<sup>14</sup> for each conviction.

## Jurisdiction

In accordance with the principle of universal jurisdiction discussed above, the Criminal Code permits Australia to charge and convict perpetrators for atrocity crimes regardless of where the crime was committed in the world, or the nationality of the alleged perpetrator and victims. Crimes which attract universal jurisdiction in Australia include: genocide, crimes against humanity, war crimes, slavery and torture. In practice this means, for example, that a foreign corporation that commits a war crime in a foreign nation against a foreign citizen can be held accountable in an Australian court. Similarly, an Australian individual or corporation to be investigated, charged and prosecuted for war crimes in a foreign territory under the same principle.

## What actions may result in companies being liable for war crimes?

The daily operations of companies carrying out business in armed conflict zones can result in legal liability for war crimes. Some examples and fictional case studies are provided below.

## Acquisition of property or resources

Companies that over-exploit natural resources, appropriate property for private use without the owner's consent, or seize property from enemy parties may be liable for a range of war crimes under the Criminal Code. This includes pillaging, destruction or appropriation of property, or destruction or seizure of enemy or adversary property.

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<sup>13</sup> Section 4B *Crimes Act 1914* (Cth).

<sup>14</sup> As of 1 July 2020, the value of a Commonwealth penalty unit was increased to AUD222 under the Attorney-General's Notice of Indexation of the Penalty Unit Amount. The value of penalty units increases every few years.



**Fictional case study:** An Australian company is engaged in mineral extraction in Bordovia. The ongoing conflict with state military forces caused many people in the nearby villages to flee, and the company expands its extraction into the now empty villages. The company may be liable for the offence of appropriation of property under the Criminal Code, which carries a maximum sentence of 15 years imprisonment for an individual and maximum penalty of AUD 83,250 for a corporation.

## Transfer or relocation of civilians

Companies that forcibly evict civilians from prospective business sites, or engage in operations which destroy homes or land, or otherwise render residential or agricultural land uninhabitable, may be liable under the Criminal Code for offences relating to the transfer or displacement of civilian populations.

**Fictional case study:** An Australian construction company based in Khemed is retained to develop new public facilities near a town in neighbouring territory under its occupation. The site was partially cleared, however a handful of families remain living there. Prior to developing the land, the company subcontracts another company to evict the families. Both companies may be liable for the offence of the displacement of civilians under the Criminal Code, which carries a maximum sentence of 15 years imprisonment for an individual and maximum penalty of AUD 83,250 for a corporation.

## Use of armed security forces

Companies that contract private or government security forces must ensure that these forces comply with IHL targeting and proportionality principles, as well as any other applicable rules and legal frameworks, such as domestic criminal law, when defending businesses sites from parties to the conflict. Failure to do so may result in the company being complicit in war crimes or liable by way of joint commission. Escalated violence during defensive security operations may lead to war crime violations, such as, attacking civilians, causing excessive incidental death, injury or damage, or using prohibited weapons.

**Fictional case study:** An Australian company producing and exporting spices from San Theodoros hires additional security forces to protect its premises in the northern province. Overflow of violence from the surrounding conflict spills out into the region. Local government forces dispel the violence using a number of company-leased roads and access points. The company's security forces lend its support to the operation as a means of defending company land and assets. The security forces shoot and kill a number of civilians in the process. The company may be liable for the offence of wilful killing under the Criminal Code, which carries a maximum sentence of life imprisonment for an individual and maximum penalty of AUD 2,220,000 for a corporation.

## Provision of goods, services or other forms of assistance

Companies that manufacture or trade prohibited weapons, components or chemicals, or companies that provide logistical, financial, information or transport services to armed groups may be complicit in war crimes where these goods or services ultimately assist in the commission of war crimes by the armed groups. Examples include where a company provides weapons or transport to government forces, and the government forces rely on the weapons or transport to carry out attacks on civilians. Penalties for company conduct will depend on the underlying war crime committed by the perpetrator.

**Fictional case study:** An Australian company producing steel in Syldavia obtains a lucrative contract with the government of a neighbouring State currently engaged in a NIAC. The company is aware that the steel it produces is used to build military aircrafts. If these aircrafts are used in air raids against civilians, the company may be liable for aiding and abetting wilful killings, or attacking civilians under the Criminal Code, which carries a maximum sentence of life imprisonment for an individual and maximum penalty of AUD 2,220,000 for a corporation.

## Procuring resources, goods or services

Companies that procure resources, goods or services knowing that its supply has or will result in the commission of war crimes, may be complicit in such crimes. For example, companies procuring resources or labour services knowing that they are derived from the forced labour of conscripted children, prisoners of war or other protected persons may be complicit in war crimes prohibiting the enlistment of children into armed forces or groups, or compelling services by persons in hostile forces.

**Fictional case study:** An Australian company based in Sethru imports livestock from government owned farms in a neighbouring country. The company is aware that workers on these agricultural farms are children that have been forcibly conscripted into national service. This company may be liable for complicity in using, conscripting or enlisting children under the Criminal Code, which carries a maximum penalty of 17 years imprisonment for an individual and a maximum penalty of AUD 94,350 for a corporation.

## Real-life examples of companies being investigated or prosecuted for war crimes

### Providing transport services to government forces

In September 2005, the Australian Federal Police investigated a foreign company with offices in Australia that was alleged to have been complicit in war crimes by providing transportation to government forces during the armed conflict in the Democratic Republic of Congo. The forces were alleged to have engaged in activities including the summary execution of civilians. The inquiry closed two years later after the defendants were acquitted in foreign proceedings.

### Procuring gold obtained through pillaging

In 2013, a foreign country investigated a precious metal company for knowingly trading in gold that was pillaged and looted by government forces and local armed groups during an armed conflict in the Democratic Republic of Congo. While the case closed in 2015, the investigation nonetheless shows the liability risks for companies dealing with supply chains in armed-conflict zones.

### Financing war crimes

In 2016, a foreign country investigated an international cement company for complicity in war crimes, crimes against humanity and terrorism financing for its role in maintaining business activities during the armed conflict in Syria. The court found that the company bought resources from multiple armed groups, including designated foreign terrorist organisations, and paid unofficial taxes to such groups in exchange for safe passage and operations in the territory. Eight of the company's former executives were charged with financing terrorism and endangering staff. In October 2022, the company and its Syrian subsidiary pleaded guilty to conspiring to provide material support and resources in Northern Syria from 2013 to 2014 to the Islamic State and the al-Nusrah Front. The defendants were sentenced to terms of probation and required to pay penalties totalling USD 777,780,000.

### Displacing civilians

In 2018, an investigation by a foreign country led to war crime charges against the chief executive officer and Chairman of an oil company operating in Sudan (now South Sudan). It is alleged that the company paid government forces and non-state armed groups to forcibly displace civilians from extraction sites. An approximate 12,000 people were killed and 160,000 were displaced during this time. The company and two of its officers were indicted for aiding and abetting war crimes, with legal action ongoing as at 2022.

### Supporting armed forces

In 2017, a director of a foreign logging company was sentenced to 19 years imprisonment in their originating country for offences including aiding and abetting war crimes. The court found that the director provided weapons, logistical support and company personnel to assist former Liberian President Charles Taylor and his forces during an armed conflict which involved mass atrocities including the use of soldiers and sexual slavery.

## What other legal liabilities are corporations exposed to if they commit war crimes?

Corporations and associated individuals that engage in war crimes may also face other forms of criminal and civil exposure under Australian law.

### Sanctions

Under Australian sanctions law, Australia implements United Nations Security Council sanctions regimes and Australian autonomous sanctions regimes. The latter are primarily implemented under the *Autonomous Sanctions Act 2011* and the *Australian Autonomous Sanctions Regulations 2011*.

The *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021* (Cth) came into force on 8 December 2021, enabling the Australian Government sanction those engaging in 'egregious conduct' such as corruption and serious violations of human rights and IHL. Australia is one of the first few countries to expressly include violations of IHL into Magnitsky-style sanctions laws. Under these laws perpetrators around the world who are responsible for, or complicit in, serious violations of IHL may be subject to a variety of measures in Australia, including travel bans, funds and asset freezes, and restrictions on access to Australian financial institutions.

Australian sanctions law applies to activities undertaken both in Australia and overseas by Australian citizens and Australian-registered bodies corporate.

### Money laundering offences

Corporations directly or indirectly financing war crimes or receiving moneys derived from war crimes may be liable for money laundering offences.

Money laundering involves dealing with instruments or proceeds of crime. In the context of war crimes, dealing with instruments and proceeds of crime include receiving, possessing, disposing, importing or exporting, or banking with property or money that was, directly or indirectly:

- used to facilitate war crimes; or
- substantially derived from, or realised through, war crimes.

These offences are codified under Division 400 of the Criminal Code and carry maximum penalties of up to life imprisonment for individuals and fines of up to 10,000 penalty units (AUD 2,200,000) for corporations.

Suspected proceeds, or instruments, of war crimes may be subject to restraint and forfeiture under the *Proceeds of Crime Act 2002* (Cth). This can occur in situations where the company itself is not implicated in the commission of alleged war crimes.

## Directors' duties under corporations law

Directors or other officeholders that authorise, direct or otherwise participate in war crimes undertaken by their company or its personnel may be liable for contravening their duties to the company. Under the *Corporations Act 2001* (Cth), directors' duties include exercising care and diligence,<sup>15</sup> acting in good faith and for a proper purpose,<sup>16</sup> and avoiding improper use their position<sup>17</sup> or company information.<sup>18</sup> Failure to do so may result in large civil penalties.

Directors may also be liable for criminal penalties if they breach their company duties in a dishonest manner.<sup>19</sup> Where directors act in bad faith, for an improper purpose, or misuse their position by facilitating or committing war crimes, they may be liable for criminal penalties of up to 15 years imprisonment and/or large fines.

## Human rights

Human rights law is distinct from, but complementary to, IHL. Both bodies of law seek the protection of life, health and dignity. Violations of human rights and violation of IHL tantamount to war crimes may intersect with respect to issues such as modern slavery.

Modern slavery describes serious exploitation in which victims are deprived of their right to freedom through coercion, threats or deception and forced into situations including slavery, human trafficking, forced labour, forced marriage and child labour. While these situations occur in peacetime, modern slavery risks are heightened during armed conflict.

Companies with business operations or supply chains in conflict-affected areas should be mindful of these risks and ensure that proper investigations and reporting are undertaken pursuant to Australia's *Modern Slavery Act 2018*.<sup>20</sup>

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<sup>15</sup> Section 180 of the *Corporations Act 2001* (Cth) ('*Corporations Act*').

<sup>16</sup> Section 181 of the *Corporations Act*.

<sup>17</sup> Section 182 of the *Corporations Act*.

<sup>18</sup> Section 183 of the *Corporations Act*.

<sup>19</sup> Section 184 of the *Corporations Act*.

<sup>20</sup> The *Modern Slavery Act 2018* (Cth) provides a regime under which companies with annual consolidated revenue of at least AUD 100,000,000 must report, and prepare annual statements, on risks of modern slavery in their global supply chains and actions taken by the company to address such risks. The Australian Government publishes these annual statements.

## Protection of the red cross emblem

Under section 15 of the *Geneva Conventions Act 1957* (Cth), it is a criminal offence under Australia law to use the emblem of a red cross with vertical and horizontal arms of the same length on and surrounded by a white ground, or associated emblems such as the Red Crescent, without authorisation from the Minister for Defence. Doctors, pharmacists, advertisers and other companies should be mindful not to use the Red Cross as a sign for hospitals, surgeries, first-aid kits or any health-related products, as this may result in fines and confiscation of improperly branded goods.



*Flags on the occasion of the 30th International Conference of the Red Cross and Red Crescent – ICRC/Jorge Perez*

## Where can I find further information?

Further information about responsible business in conflict-affected areas can be found online on the Australian Red Cross 'IHL and business' page: <https://www.redcross.org.au/ihl/business-and-ihl/>.

# Contact Details

**Australian Red Cross International Humanitarian Law Department**

<https://www.redcross.org.au/ihl/>

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